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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 608

WILLIAM A. H. HOWLAND,

Petitioner,

vs.

AMBER JUSTIZ STITZER, NOW REMARRIED AND KNOWN AS MRS. SHERMAN HAWES, JR.

Defendant

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA AND BRIEF IN SUPPORT THEREOF.

DAVID L. KROOTH,
CHARLES N. MALONE,
WILLIAM J. COCKE,
Counsel for Petitioner.

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Defendant

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Summary and Short Statement of Matters Involved

Petitioner instituted his action January 24, 1952, in the Superior Court of Buncombe County, North Carolina, a court of first instance, to recover from First National Bank and Trust Company of Asheville, N. C. income from four unearmarked shares of stock of Providence Journal Company, a Rhode Island Corporation, which was collected for the petitioner by said bank under an agreement entered into by and between the petitioner and the bank on or about

the 30th day of October, 1940. (R. pp. 1-25) The bank had refused and failed to pay this income to him on account, as it alleged, of the adverse claim of the defendant Amber Justiz Stitzer remarried and now known as Mrs. Sherman Hawes, Jr., who is not and was never a party to said agreement. This defendant had married petitioner in 1941. They were divorced in the State of New York October 15, 1947. She sets up her claim for this income under an alleged support agreement executed by her and the petitioner on the 2nd day of April, 1947, in the State of New York while they were residents of said state, in which state petitioner now resides. The defendant, Mrs. Hawes, is now a resident of the State of Massachusetts. The defendant Mrs. Hawes claimed the income under the agreement in her Answer. (R. pp. 25-32) In reply Mr. Howland alleged that under the laws of the State of New York the agreement of April 2, 1947, was invalid and void *ab initio* under and by virtue of a statute of the State of New York, to-wit: Domestic Relations Law Section 51 which reads as follows:

> "A husband and wife cannot contract to alter or dissolve their marriage." R. pp. 110, 111. (R. pp. 86-99; pp. 64-77; pp. 109-116)

The defendant Mrs. Hawes moved to strike this defense. (R. pp. 103-109; pp. 116-119) Her Motion was overruled in the Superior Court of Buncombe County. (R. p. 120) She took an appeal to the Supreme Court of North Carolina, the Court of last resort in this State. (R. p. 120) The Supreme Court of North Carolina reversed the action of the Judge of the Superior Court. It held that her motion to strike from petitioner's Reply all of his allegations which attacked the validity of the separation agreement entered April 2, 1947, should have been granted. (R. p. 134) The petitioner timely filed his Petition to Rehear in

the Supreme Court of North Carolina which motion was denied. (R. p. 141) Hence, this Petition for Certiorari.

On February 13, 1947, the defendant Mrs. Hawes, then petitioner's wife, had instituted a divorce proceedings in the State of New York pursuant to a scheme entered into by and between her and the petitioner in which he agreed to the provisions of the support agreement and pursuant to which she agreed to institute the proceedings and carry same to final conclusion and he agreed not to defend same. It is alleged that she would never have gotten the divorce had he not signed the agreement. (R. pp. 73, 88) The divorce action was brought in the Supreme Court of the State of New York held in and for the County of New York, a court of first instance. The interlocutory decree of divorce between the parties was entered on July 11, 1947, in which it was provided that "the defendant shall provide for the support and maintenance of the plaintiff during the entire period of her lifetime in accordance with the terms of an agreement between the parties dated the 2nd day of April, 1947." (R. p. 15) The final decree of divorce was entered October 15, 1947. (R. p. 18) Thereafter, the defendant Mrs. Hawes, Jr. covertly so far as the petitioner was concerned married Stitzer. As soon as the petitioner discovered this marriage and verified it, he revoked instructions which he had given First National Bank to pay the *feme* defendant out of income belonging to him being collected by said bank, and instituted on December 5, 1949, his former action in the Superior Court of Buncombe County alleging the remarriage of the defendant Mrs. Hawes, and contending that she was not entitled to any of the funds which the bank was paying her by reason of his prior instructions to the bank. He prayed the Court that the bank be restrained from further paying Mrs. Stitzer. The contentions of Mr. Howland were sustained in

the Superior Court on Mrs. Stitzer's demurrer and motion to dismiss an injunction. She appealed and the holding of the Superior Court was reversed by the Supreme Court of North Carolina. That Court held the action one to modify a Judgment of a sister state, sustained the demurrer and dismissed the action. The Supreme Court of North Carolina distinguished the holding of this Court in the case of *New York* v. *Halvey*, 330 U. S. 610. The Court further held that if the provisions of the support agreement were stricken out of the divorce Judgment by the Courts of New York pursuant to Section 1172-c, Thompson's Laws of New York, 1942 Cumulative Supplement (Civil Practice Act) it would have no difficulty in sustaining the contentions of the plaintiff. *Howland* v. *Stitzer*, 231 N. C. 528 at pp. 530, 531. Acting on the intimation of the Supreme Court of North Carolina, this petitioner then moved in the original divorce proceedings in the State of New York to strike from the original divorce Judgment the provisions for support. This relief was granted after due notice, argument and hearing by the Supreme Court of the State of New York. A copy of the original Judgment, Order of Modification and Dismissal of Mrs. Hawes' appeal to the Appellate Division is a part of the record before this Court. (R. pp. 20-25)

The Supreme Court of the State of North Carolina in its opinion in the instant case (236 N. C. 230; R. p. 124) finally denied petitioner's right to a day in court on the issue of the invalidity of the support agreement of April 2, 1947, which issue was based on the statutory law of New York and the decisions of that state. It failed to give said Statute and decisions full faith and credit; and failed to give full faith and credit according to the law and usage of said state to the order of the Courts of New York modifying said original divorce decree by holding that the instrument

involved should be enforced as written, notwithstanding a proper pleading of Domestic Relations Law Section 51. Further, there was no provision in the agreement of April 2, 1947, or in the original divorce Judgment that the rights of Mrs. Hawes to the income should survive in the event the support agreement should be stricken from the Judgment as was done by the Supreme Court of New York.

Jurisdictional Statement

This is a Petition for a Writ of Certiorari to be directed to the Supreme Court of the State of North Carolina, the Court of last resort and final appeal in said state, seeking to review for errors assigned its opinion and Judgment entered October 8, 1952, in which action the petitioner herein timely filed his Petition for Rehearing within forty days of the date of said opinion and Judgment, which Motion for Rehearing was denied by the said state Court November 21, 1952. (See Rules N. C. Supreme Court, General Statutes of North Carolina, Vol. 4, Appendix 1, p. 20, Rule 44) (R. pp. 142-145).

The jurisdiction of this Court is invoked under 28 U. S. C. A. Section 1257, Clause 3 (June 25, 1948, c. 646, 62 stat. 929). The opinion and Judgment of the Supreme Court of North Carolina is a final Judgment. The plaintiff-petitioner herein is "estopped" from attacking the agreement of April 2, 1947, it held. The Court struck out his only defense thereto. It held that the instrument involved should be considered as written. This becomes the law in the case. Thereby the petitioner is denied his day in court and has no further redress in the Courts of North Carolina. The title, right, privilege or immunity claimed under the Constitution of the United States, to-wit: Article IV Section 1 is specifically set up and claimed in the Complaint of the petitioner in this action, to-wit: Paragraph 13 (R. p. 6).

The statutory and decision law of the State of New York to which the Supreme Court should have given full faith and credit is fully set out in the pleadings of the petitioner (R. pp. 74, 89, 90, 92, 110, 111, 112, 115). Furthermore, Article IV Section 1, United States Constitution is specifically again claimed in his petition for Rehearing in the Supreme Court of North Carolina. The Petition for Rehearing was based solely on failure of the Supreme Court of North Carolina in its opinion, and Judgment to give full faith and credit to the public Acts, Records, and judicial proceedings of the State of New York. A Judgment of the State of New York is directly involved in this action (R. p. 20; see also Opinion of Supreme Court of New York, R. p. 68). The ruling of the Supreme Court of North Carolina denying petitioner his day in Court on the issue of the invalidity of the agreement under Domestic Relations Law Section 51 as alleged in his pleadings, and holding the agreement should be enforced as written, even absent provisions in the Judgment of divorce or in the agreement of April 2, 1947 for survival of the support provisions if the Judgment of Divorce be modified under the laws and usage in the State of New York, does not give full faith and credit to the public Acts, Records, and judicial proceedings of the State of New York, and contravenes Article IV Section 1 United States Constitution which is specifically claimed.

St. Louis Iron Mountain & Southern Railway Co. v. *Starbird*, 243 U. S. 592

Tilt v. *Kelsey*, 207 U. S. 43

Titus v. *Wallick*, 306 U. S. 282

Brown v. *Western R. of Alabama*, 338 U. S. 294

Great Northern Ry. Co. v. *Sunburst Oil & Refining Co.*, 287 U. S. 358, 77 L. Ed. 360, 287 U. S. 580, 77 L. Ed. 508.

The opinion of the Supreme Court of North Carolina was entered October 8, 1952. Within rules of the North Carolina Supreme Court, a Petition for Rehearing was filed by the petitioner on November 8, 1952. The Supreme Court had issued an Order directing that the opinion and Judgment of October 8, 1952, not be certified to the lower Court during the pendency of the Motion to Rehear. The North Carolina Supreme Court issued its Order denying the Motion for Rehearing on November 21, 1952 (R. p. 141). This Petition is filed within a period of ninety days after the entry of the Order of the Supreme Court of North Carolina denying the Motion for Rehearing (R. p. 148). This complies with 28 U. S. C. A. Section 2101.

National Labor Relations Board v. *McKay Radio and Telegraph Co.*, 304 U. S. 333, 82 L. Ed. 1381.

Questions Presented

1. Where the petitioner had alleged that the support agreement of April 2, 1947, providing for the payment of money *in futuro* was void *ab initio*, did the Supreme Court of North Carolina fail to give full faith and credit to the public Acts, Records, and judicial proceedings of the State of New York when it failed to recognize Domestic Relations Law of the State of New York Section 51 as a valid defense to the agreement when it held that petitioner was estopped by ratification from asserting the invalidity of a contract claimed by him to be void and unenforceable under the provisions of that public Act and under the law and decisions, public policy and usages of said State?

2. When the Supreme Court of North Carolina held that the agreement of April 2, 1947, should be enforced as written, did it fail to give full faith and credit to the Order of the Supreme Court of New York striking out provisions for support of defendant Hawes where there was no reser-

vation in the New York Judgment or in the agreement that it should survive such modification?

Reasons Relied upon for Allowance of the Writ

Aside from the fact that this case involves a substantial sum of money and is of the gravest importance to the petitioner, the questions involved are of national importance in that the determination by the Supreme Court of North Carolina of the case contravenes the principle that the laws of sister states shall be applied in the courts of the forum when they are invoked, and full faith and credit given to their judicial proceedings. The North Carolina Court failed to honor the statute of New York in a way not in accord with the United States Constitution and the applicable decisions of this Court. *Bradford Electric Co.* v. *Clapper,* 286 U. S. 145; *John Hancock Ins. Co.* v. *Yates,* 299 U. S. 178.

This is a case in which an unrecognized and untenable basis is held by the lower court to defeat petitioner's day in Court on the issue of invalidity of an agreement which under a New York Statute, the *lex loci contractus,* is void *ab initio.* The North Carolina Court failed to recognize that all facts and circumstances surrounding the institution of the divorce action, and the execution of the agreement would be drawn into question and looked into by the Courts of New York in applying Section 51. It failed to honor these decisions, and consequent laws and usages of the Courts of New York in applying this statute. It further held in effect that regardless of Section 51, and we suppose, regardless of whether the contract was void *ab initio,* the contract is validated by ratification, and the petitioner is estopped to plead Section 51. That a contract void *ab initio* under a prohibitory statute may be so validated is to our thinking a principle unknown to American jurisprudence.

It is certainly not the law of this Court or of New York. Further there are provisions in the agreement which under New York decisions support petitioner's contentions that the contract was entered into to promote and facilitate a divorce. In addition petitioner's allegations are sufficient to admit parol evidence to show the illegal consideration, and that the support provisions were agreed to and the contract signed and entered into for the simple purpose of facilitating and procuring the divorce. New York cases are legion that such a contract is void *ab initio* and that parol evidence is admissible to so show. To hold that the contract void under the statute of a sister state may be ratified and one party estopped to plead its illegality is to set at nought the full faith and credit clause. Such a precedent opens the flood gates for every Court in the Union to avoid Article IV Section 1 by holdings based on any peculiar and unexpected doctrine. *Bradford Electric Co.* v. *Clapper* (cited supra).

Neither can the North Carolina Court as was done in this instance hold that such a contract may be enforced as written when such a holding runs counter to the public policy of the State of New York, absent express reservations that the contract should survive after modification of the original divorce Judgment; the support provisions being stricken from the Judgment under Civil Practice Act Section 1172-c. Such a holding fails to give full faith and credit to the action of the Supreme Court of New York in modifying the Judgment by striking the support provisions therefrom.

In the interest of brevity the petitioner does not at this time set forth here all of the points which will be argued on the merits of this case should the Writ of Certiorari be granted nor all of his contentions in support of these points nor all of the points argued at length in the brief accompanying this Petition. The petitioner here refers to his

brief and incorporates in this Petition all the matters presented further therein.

WHEREFORE, this petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the Supreme Court of North Carolina at Raleigh, N. C. commanding that Court to send to this Court for its review and determination on a day certain to be in said Writ named, a transcript of the record and the proceedings in this action and that the decree and Judgment of the Supreme Court of North Carolina in this action be reversed and your petitioner have such other and further relief in the premises as to this Honorable Court may seem meet and just.

DAVID L. KROOTH,
CHARLES N. MALONE,
WILLIAM J. COCKE,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 608

WILLIAM A. H. HOWLAND,

Petitioner,

vs.

AMBER JUSTIZ STITZER, NOW REMARRIED AND KNOWN AS MRS. SHERMAN HAWES, JR.

Defendant

BRIEF SUPPORTING PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Statement of Grounds on Which the Jurisdiction of the Supreme Court Is Invoked

The jurisdictional statement contained in the Petition is fully and amply set forth and we need not, in the interest of brevity, repeat same. It is set forth at pages 5, 6, 7 of the Petition and is referred to and incorporated herein by reference.

Statement of Case

The petitioner herein and Mrs. Hawes, Jr. were married January 6, 1941. They lived thereafter a short time to-

gether happily but soon the defendant entered into a course of conduct calculated, designedly and maliciously to provoke the petitioner in desiring to be separated from her. He alleges that she began to extract large sums of money from him on various pretexts, maliciously contrived to pauperize him by demanding that he make over to her one-half of all of his estate to keep him from suing her for divorce; that she failed to provide any home life, consorting with male companions unknown to the petitioner; went on numerous trips to Cuba, Florida, Arizona, Mexico and California during which time she consorted with male companions unknown to him, continually pursued a course of conduct in public so as to embarrass the petitioner in public before his friends, acquaintances and kinsmen (R. pp. 71, 72). He threatened to leave her but she retaliated with threats to have him fired from his job unless he would pay her the sum of $350 a month for her support and maintenance. By her wiles and stratagem and trickery he was induced to enter into the support agreement of September 18, 1946 (R. p. 72—Agreement, R. p. 77). She still pursued her scheme to extort and relieve petitioner of his monies, threatened never to get a divorce or to remarry which representations he now believes were fraudulently made, and to the end that both should be freed from wedlock, they entered into a scheme to procure the divorce, petitioner agreeing to the provisions of the support agreement of April 2, 1947, and the defendant Hawes agreeing for the benefits to be conferred thereunder to institute suit for divorce. The suit was instituted by the defendant Hawes on February 13, 1947. The petitioner herein had agreed not to defend the proceedings and the defendant Hawes, the plaintiff in that action, had agreed to proceed promptly to get the divorce. In furtherance of the scheme to facilitate and promote the divorce and during the pendency of the

divorce proceedings the support agreement of April 2, 1947, was executed. All of the considerations moving the parties to enter into the agreement were not set forth in the agreement itself. (R. pp. 73, 74). The undefended matter came on for hearing on or about July 11, 1947, in the Supreme Court of New York and provisions for support as set forth in the agreement of April 2, 1947, were incorporated in the Judgment. (R. p. 14) These allegations were set forth in detail by the petitioner in his Reply to First National Bank and Trust Company. They were likewise repeated in detail in his Reply to the Answer and Cross Action of the defendant Mrs. Hawes. (R. pp. 86-91) It was to the allegations in the Reply of Mr. Howland to her Answer and Cross Action that her first Motion to Strike was directed. The lower Court considered that evidentiary matter was pleaded, intimated that an amended Reply should be filed by Mr. Howland to the Answer and Cross Action of Mrs. Hawes and it was ordered that the Amended Reply as tendered, namely the Amended Reply set out at Record pages 109 thru 116 be allowed. Defendant Mrs. Hawes had filed an additional Motion to Strike the allegations of this Amended Reply (See Record pp. 116-119) and this Motion was denied by the Superior Court (R. p. 120). It is from this action of the Superior Court that Mrs. Hawes appealed to the Supreme Court of North Carolina which Order was reversed.

Specification of Errors

1. Did the Supreme Court of North Carolina err by failing to give full faith and credit to the public Acts of New York, to-wit: Domestic Relations Law Section 51 by holding that petitioner was estopped from asserting the invalidity of a contract void *ab initio* under said Section 51?

2. Did the Supreme Court of North Carolina err in fail-

ing to give full faith and credit to a duly authenticated order of the State of New York which struck from the divorce judgment the provisions for support of the Agreement of April 2, 1947 where there was no express reservation in the Judgment or in the Agreement that it should survive modification?

Argument

1. Full faith and credit is denied because the petitioner is denied his day in Court on a substantive issue of defense.

In the beginning it is well to set forth fully the New York law involved. The Domestic Relations Law Section 51 pleaded as the grounds for the invalidity of the support agreement of April 2, 1947, has been the subject of a legion of cases. These cases in New York have always been decided on the principle that any agreement or scheme which does or tends to promote or facilitate the procuring of a divorce between husband and wife is void *ab initio* and will in no event be enforced. This is a substantive defense and we submit that the allegations in petitioner's Amended Reply are sufficient to raise the defense although the agreement to procure and promote the divorce is not included as a written provision in the agreement of April 2, 1947. New York cases hold that the defense is substantive; and that parol evidence of illegality of consideration, and facts violative of Domestic Relations Law Section 51 are admissible. The allegations as set forth were amply sufficient to admit into evidence the evidentiary matter considered bad pleadings by the trial court when petitioner requested leave to file an Amended Reply which was granted by the Superior Court. All of the elements which bring into effect Domestic Relations Law Section 51 are properly pleaded; a full and complete defense based on this statute in accordance with New York cases is set forth in the pleadings of the petitioner in his Replies. Thus, petitioner's position

on the merits is well fortified by a wealth of New York authorities.

Gould v. *Gould,* 27 NYS 2d 54, 261 App. Div. 733 (1941);
McDonald v. *McDonald,* 239 NYS 533 (1930);
Train v. *Davidson,* 47 NYS 289;
Innerfield v. *Innerfield,* 104 NYS 2d 544 (1951);
Kennedy v. *Kennedy,* 51 NYS 2d 713;
Schley v. *Andrews,* 225 N Y 110, 121 N E 812;
Harris v. *Harris,* 287 N Y 444;
Murthey v. *Murthey,* 287 N Y 740.

It is in the face of these decisions that the Supreme Court of North Carolina enunciated its peculiar and unexpected doctrine that a contract void *ab initio* and against public policy could be validated by the acts and conduct of one of the parties by making payments thereunder; that thereby petitioner was estopped to plead the statute, and that the agreement should be enforced as written regardless of the facts and circumstances surrounding the institution of the divorce proceedings, and the facts surrounding its execution during the actual course of the divorce proceedings. Such holding in our mind, in the face of the statute itself and this legion of New York decision law constitutes a denial of the full faith and credit clause particularly where a *ratio decidendi* is given which has no basis in the law and usage of the sister state to avoid the application of the statute. It is noteworthy that the Supreme Court of North Carolina in the adoption of its so-called estoppel doctrine, did not support it by any applicable decision in the state of New York or elsewhere. In fact the decisions of the State of New York are to the contrary.

Wheeler v. *Wheeler,* 5 Lans. (N.Y.) 355;
Brick v. *Campbell,* 122 N.Y. 337, 25 N.E. 493;

Strauss v. *Linotyping Co.* v. *Schwalbe*, 144 N.Y.S. 549;
Sirkin v. *14th Street Store*, 108 NYS 830;
Reiss v. *Reiss*, 186 Misc. 511, 59 NYS (2d) 828;
See also: *Doherty* v. *Bartlett*, 81 F. (2) 920 (Cert. denied 298 U.S. 676) citing *Wheeler* v. *Wheeler* (cited supra).

This Court will apply the *lex loci contractus* in holding that an illegal contract cannot be given vitality by ratification and estoppel.

Steele v. *General Mills, Inc.*, 329 U.S. 433.

Further it is a strange doctrine indeed which will permit only the face of an agreement to be controlling when illegality of consideration is pled as a defense. This is not the law of New York.

Train v. *Davidson* (cited supra);
Pink v. *Kaplan, Inc.*, 300 NYS 45, 252 App. Div. 490;
Chapin v. *Austin*, 300 NYS 932;
Salt Springs Nat. Bank v. *Hitchcock*, 263 NYS 55 at p. 60;
Guild v. *Quinn*, 118 NYS 582.

It is furthermore universally accepted except in the instant case by the Supreme Court of North Carolina that the doctrine of clean hands does not apply to a contract violative of public policy.

Snell, Principles of Equity, 19th Ed. at p. 16;
McCraith v. *Buss* 198 App. Div. 524, 190 NYS 597.

We believe that we have thus conclusively shown that the exceptional and unexpected doctrine announced by the Supreme Court in this case to deny petitioner's day in Court is not recognized by the Courts of New York. In view of such a conclusion we submit that this is a case in

which the Supreme Court of the United States should, in order to enforce a clear mandate of the Constitution, intervene and reverse the holdings of the North Carolina Court. We argue that a defense which is valid in the State of New York, and would prevail there under its decisions should be valid in North Carolina when the contract is a New York contract and when it was void *ab initio* in New York. We argue that the statute of the State of New York should be applied in North Carolina as it would be applied in New York. We believe that this holding of the North Carolina Court particularly when it is based on an untenable *ratio decidendi* should be corrected to the end that a precedent will not be established which would allow the Courts of every State in the Union to avoid the laws and decisions of sister states by unprecedented, unexpected and peculiar doctrines. A defense under a statute of a sister state is within the protection of the full faith and credit clause of the United States.

Bradford Electric Co. v. *Clapper,* 286 U.S. 145 (1932);
John Hancock Insurance Co. v. *Yates,* 299 U.S. 178 (1936).

2. Full Faith and credit is denied the New York Order striking out the support agreement of April 2, 1947.

The statutes, customs, usages, decisions and public policy of the State of New York abhor the support of a remarried wife by her ex-husband.

Civil Practice Act, Sec. 1172-c (cited supra);
Kirkbride v. *Van Note,* 9 N.E. (2) 852;
Schley v. *Andrews* (cited supra).

However, the North Carolina Court refused to give effect to the New York Order of May 1, 1951 (R. pp. 20, 21), striking out the support provisions. The New York law is to

the effect that absent express reservations of survival, such agreements do not survive such modification. To hold otherwise is to violate the public policy of the State of New York.

Davis v. *Welker*, 103 NYS (2) 239;
Nero v. *Nero*, 104 NYS (2) 820.

Although the support provisions are stricken from the original divorce Judgment, the North Carolina Court enforces the provisions. This is not in accord with the decisions of this Court.

Chicago and A. R. Co. v. *Wiggins Ferry Co.* 119 U.S. 615, 622.

Conclusion

It is, therefore, respectfully submitted that the North Carolina Court has erred as set forth and that a Writ of Certiorari should be directed to that Court to the end that the errors may be corrected.

Respectfully submitted,

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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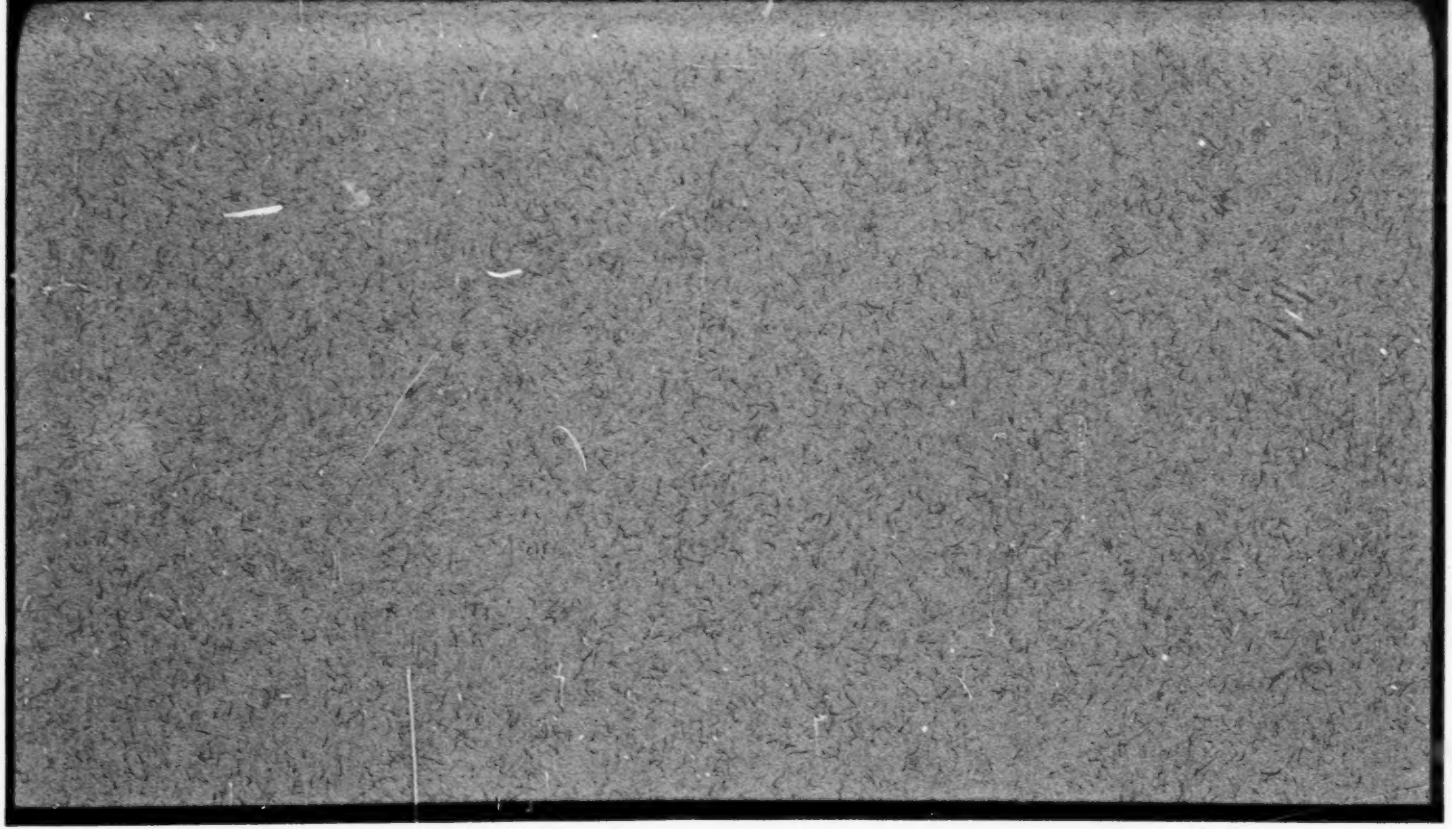

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 608

WILLIAM A. H. HOWLAND,

Petitioner,

vs.

AMBER JUSTIZ STITZER, NOW REMARRIED AND KNOWN AS MRS. SHERMAN HAWES, JR.,

Defendant

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Jurisdictional Statement

While the jurisdiction of this Court for a writ of Certiorari to review a decision of the Supreme Court of North Carolina, is correctly attempted to be invoked under 28 U. S. C. A., Section 1257, Clause 3, and certain procedural details have been performed in apt time by the Petitioner,

it is respectfully submitted that the petition for a writ of certiorari should be denied for the following reasons:

1. This case does not involve questions of importance which it is in the public interest to have decided by this Court, and

2. No Federal question is involved, and

3. The decision of the state court was not a final judgment.

Statement of Case

For convenience and accuracy of reference, William A. H. Howland will be hereinafter referred to as the "Petitioner", and Mrs. Sherman Hawes, Jr., will be hereinafter referred to as the "Respondent".

While the Statement of the Case in the Petition and Brief in Support of the Petition, after deleting all argumentative, controversial, immaterial and irrelevant matter and aspersions, is substantially correct, the Respondent desires to submit to the Court a Statement of the Case as the relevant facts appear from the record before this Court.

The Respondent has been subjected to so many legal machinations by the Petitioner in this case that a brief statement is impossible. However, every effort will be made to make such statement as concise as possible. The Petitioner and Respondent were married on January 6, 1941. Thereafter, on September 18, 1946, while both were residents of the State of New York and living separate and apart, they entered into a legal and valid separation agreement, hereinafter referred to as the "First Agreement" (Agreement, R. p. 77). On February 10, 1947, the Respondent instituted an action in the Supreme Court of New York against the Petitioner for an absolute divorce *on the grounds of adultery* (Judgment, R. p. 15. *The Petitioner was personally served with summons* (Judgment, R. p. 15). During the pendency of the divorce action and on April 2,

1947, the Petitioner, as it is alleged (Reply, R. p. 87), finding the First Agreement burdensome, upon his own initiative, sought relief from said agreement and on April 2, 1947, another agreement, hereinafter referred to as the "Second Agreement", was entered into between the parties in lieu of the First Agreement while the parties were still living separate and apart (Agreement, R. p. 47). *The Second Agreement* provided, among other things, that in lieu of $350.00 per month, provided for in the First Agreement, that the Respondent was to receive the income from four shares of stock of the Providence Journal Company, a Rhode Island Corporation, held in trust by the First National Bank & Trust Company, Asheville, North Carolina, *for her lifetime and irrespective of her marital status* (Agreement, R. p. 48 and R. p. 50). Contemporaneously with the execution of said Second Agreement, the petitioner wrote a letter to the First National Bank & Trust Company wherein Petitioner stated that *"I have given to her* (Respondent, parentheses mine) *a life estate in four shares of stock"* (Letter, R. p. 51). A comparison of these two agreements clearly indicates that the Second Agreement was most favorable and advantageous to the Petitioner. Such a comparison also clearly and unquestionably indicates the intent of the said Second Agreement to survive remarriage of the Petitioner for while the payments under the First Agreement specifically were to cease upon the remarriage of the Respondent (Agreement, R. p. 46), the Second Agreement specifically provided that the income from said stock was to be paid *irrespective of the marital status of the Respondent* (Agreement, R. p. 50), *and irrespective of any action taken by either party in any court* (Agreement, R. p. 50).

On July 15, 1947, the Respondent obtained an interlocutory decree of divorce from the Petitioner (Judgment, R. pp. 14-19) and the decree became final on October 15, 1947

(Judgment, R. pp. 19-22). The divorce decree incorporated and approved the said Second Agreement (Judgment, R. p. 17). *Petitioner appeared by counsel in the New York Divorce action and made no objections whatsoever to the incorporation of the Second Agreement into the divorce decree or any objections of any kind* (Judgment, R. p. 15). *Petitioner remarried the day after the aforesaid decree became final.* Payments of the dividends from said stock were paid to Respondent from the date of execution of the Second Agreement on April 2, 1947, without any objections on the part of Petitioner, until December 5, 1949, when Petitioner instituted an action in the Superior Court of Buncombe County, North Carolina, restraining the First National Bank & Trust Company from making further payments to Respondent. The basis of Petitioner's action was that such payments should cease because of the remarriage of Respondent. Respondent demurred to Petitioner's alleged cause of action and upon the overruling of Respondent's demurrer, Respondent appealed to the Supreme Court of North Carolina. The Supreme Court of North Carolina reversed the lower Court and dismissed the action. (*Howland* v. *Stitzer*, 231 N. C. 528, 58 S. E. 2d 104.)

Thereafter, in consequence of a motion in the original divorce action in the Supreme Court of New York, the provision of the divorce decree, incorporating the Second Agreement, was stricken *but without prejudice to the rights of Petitioner under said agreement* (Judgment, R. p. 21).

On January 24, 1952, Petitioner instituted another action in the Superior Court of Buncombe County, North Carolina. Petitioner in his complaint alleged in substance that because of the divorce obtained in New York by the Respondent, the subsequent remarriage of the Respondent and the action of the Supreme Court of New York in striking the provision of the original divorce decree incorporating the said Second Agreement, that all accrued income

from said stock should be paid to Petitioner and all future payments to the Respondent should cease (Complaint, R. p. 2). No reference or allegations whatsoever were contained in said complaint as to collusion or tendency to facilitate a divorce. In other words, Petitioner relied upon the validity of his divorce to relieve him of his contractual obligations under said Second Agreement. Respondent answered, denying certain allegations of the complaint, and in a further answer, alleged that she was entitled to all accrued income and all future income for her lifetime by reason of the Second Agreement (Answer, R. p. 25). Petitioner replied and alleged that the Second Agreement was collusive and tended to facilitate the procurement of a divorce between Petitioner and Respondent and was, therefore, void as against the public policy of New York and North Carolina, despite the fact that in his complaint, Petitioner relied upon the validity of the divorce decree (Reply, R. p. 86). Respondent moved to strike certain immaterial and irrelevant matters in the reply and all allegations which attempted to set up a purported defense of the invalidity of said Second Agreement on the grounds of collusion for a number of reasons, including estoppel (Motion, R. p. 103). The Superior Court of Buncombe County, North Carolina, overruled Respondent's motion to strike the purported defense of collusion but ordered certain irrelevant matters stricken from the reply and permitted Petitioner to file an amended reply (Order, R. p. 120). Respondent renewed her motion to strike the purported defense of collusion from the amended reply (Motion, R. p. 116) and upon the motion being overruled (Order, R. p. 120), Respondent appealed to the Supreme Court of North Carolina. The Supreme Court of North Carolina decided that the motion to strike should have been allowed, reversing the lower Court, and ordered that the respective rights of the parties should be adjudicated by the lower Court as the contracts were

written (Decision, R. pp. 124-134). Petitioner filed a motion to rehear in the Supreme Court of North Carolina on November 9, 1952 (Petition, R. p. 142) which was denied, without opinion on November 19, 1952 (Letter, R. p. 141). In the petition to rehear it was urged for the first time that a Federal question might be involved. From the decision of the Supreme Court of North Carolina, Petitioner applies to this Court for a writ of certiorari for review.

ARGUMENT

The Case Does Not Involve Questions of Importance Which It Is in the Public Interest to Have Decided by This Court.

While every case assumes importance in the eyes of the parties involved, unless some important Federal question is presented, a grave and unwarranted burden would be imposed on the jurisdiction of this Court for every unsuccessful litigant to apply for a writ of certiorari to review the decision of the highest court of a state. It was never intended, nor has it ever been permitted, that the highly essential and important function of the writ of certiorari should be so encumbered but that the power to issue the writ should be used sparingly and only in cases of gravity and importance. This matter is extremely important to the Respondent and, it must be assumed that it is equally important to the Petitioner. However, its outcome is merely important to the parties themselves. There is no possibility, present or remote, that the future administration of the law will be in any way hindered by the decision herein sought to be reviewed by the Petitioner. In fact, the decision complained of may well have a salutary effect in discouraging this Petitioner and other like parties from seeking to evade their solemn contractual obligations by interposing stale and frivolous defenses to performance after

receiving all the benefits agreed upon. This rule has been stated and applied in the opinions of this Court in many and varied types of cases and is contained in the Supreme Court Rules. So well and firmly established is the rule, that counsel for the Respondent feels that it is unnecessary to make detailed citation of authority and parrot the words which this Court has used time and time again. However, the following authorities, although involving Circuit Courts of Appeal rather than state courts, adequately support this rule:

In *Carter* v. *Atlanta & St. A. B. R. Co.*, 338 U. S. 430, 94 L. ed. 236, at page 243, it was stated in a concurring opinion:

> "I would therefore dismiss the writ as improvidently granted. By not doing so, the Court encourages petitions of this character instead of discouraging them. The Court should save its energy for cases it necessarily must adjudicate in order to adjudicate them with due regard for the needs of the deliberative process. The only effective way to respect these considerations is to cease acquiescence in their disregard."

In *Layne & Bowler Corp.* v. *Western Well Works*, 261 U. S. 387, 67 L. ed. 712, at 714, Mr. Chief Justice Taft said:

> ". . . it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal."

Also, in *Magnum Import Company* v. *Coty*, 262 U. S. 159, 67 L. ed. 922, at page 924, the Court stated:

> "The jurisdiction to bring up cases by certiorari from the circuit courts of appeal was given for two purposes; first, to secure uniformity of decision be-

> tween these courts in the nine circuits; and, second, to bring up cases involving questions of importance which it is in the public interest to have decided this court of last resort. The jurisdiction was not conferred upon this court merely to give the defeated party in the circuit court of appeals another hearing. Our experience shows that 80 per cent of those who petition for certiorari do not appreciate these necessary limitations upon our issue of the writ."

Rule 38(5) of the Revised Rules of the Supreme Court provides:

> "A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor."

No Federal Question Involved

The Petitioner asserts as his basis for the granting of a writ of certiorari that the Supreme Court of North Carolina erred by failing to give full faith and credit to a statute of the State of New York, namely Section 51 of the Domestic Relation Law of the State of New York, and to the order of the Supreme Court of New York striking out the provisions in the divorce decree incorporating the Second Agreement. The general rule as to what must appear in order to justify the Court in taking jurisdiction to review the decision of a state court appears to be that: (1) *a Federal question actually arose in the case, (2) a Federal question was actually passed upon and decided by the state court, and (3) the judgment rested upon the disposition of a Federal question and that the decision of the Federal question was necessary to the determination of the cause.* The foregoing is, of course, in addition to the fact that the Federal

question must be one of substance and importance and that the decision complained of must be a final judgment.

Crowell v. *Randell*, 10 Pet. (U. S.) 368, 390;
Southwestern Bell Teleph. Co. v. *Oklahoma*, 303 U. S. 206, 212, 82 L. ed. 751, 755;
Honeyman v. *Hanan*, 300 U. S. 14, 18, 81 L. ed. 476, 479;
Lynch v. *New York*, 293 U. S. 52, 54, 79 L. ed. 191, 193;

In the interest of brevity and to avoid repetition, the above jurisdictional requirements will be discussed concurrently. Even a cursory reading of the record in this case will immediately disclose that none of the three above named requirements appear in this case and that Petitioner's grounds for the granting of a writ of certiorari are without merit.

The Petitioner did plead in various instances in his reply to the answer of the Respondent that a contract to dissolve a marriage was void, specifically basing such allegations on the grounds that such a contract was void as against the public policy of the State of North Carolina and State of New York, as such public policy is declared under Section 51 of the New York Domestic Relation Law (Reply, R. p. 86). *The North Carolina Supreme Court recognized in its opinion that this principle of law was so well settled in this country that it needed no discussion* (Opinion, R. p. 124). Therefore, Petitioner was not denied this principle of law. Nowhere in this record is there a single reference to, or any indication of, a Federal question being relied upon, raised, or presented by the Petitioner until the Petitioner filed his petition to rehear in the North Carolina Supreme Court when he then attempted to assert that the court had violated the Full Faith and Credit Clause of the United States Constitution, Article IV, Section I. Conceding for purposes of argument only that a Federal question is in-

volved, such a question is urged too late for consideration by this Court if it is raised for the first time on a petition for rehearing in the court below.

Waters-Pierce Oil Co. v. *Texas,* 212 U. S. 112, 53 L. ed. 431, 434;

Godchaux Co. v. *Estopinal,* 251 U. S. 179, 64 L. ed. 213, 214;

Johnson v. *New York Life & Ins. Co.,* 187 U. S. 491, 47 L. ed. 273, 274;

Also, none of the exceptions set forth in *Great Northern R. Co.* v. *Sunburst Oil & Ref. Co.,* 287 U. S. 358, 77 L. ed. 360, 367, appear in this case.

What exactly did the Supreme Court of North Carolina do in this case? As previously stated, it fully recognized the principle of law that contracts to dissolve the marriage relationship are void. It did not have to go to the laws of New York to find such a principle, its own public policy is to that effect as is that of all other states. However, the Supreme Court of North Carolina did not decide this case upon its own interpretation of its public policy but went into the decision law of the State of New York to determine how the courts of that state had applied Section 51 of the New York Domestic Relation Law. It took under consideration, among others, the case of *Butler* v. *Marcus,* 264 N. Y. 519, 191 N. E. 544, decided by the Court of Appeals of New York on March 23, 1934, *and found that the New York Court, upon a state of facts identical to the subject case, had affirmed a judgment and decision of the lower courts which had sustained a motion to strike a defense under Section 51 similar to the one which Petitioner attempted to assert in this case* (Opinion, R. p. 132). So well established is this principle of law in New York, which was followed by the North Carolina court in the subject case, that neither the Court of Appeals, nor the Supreme Court, Appellate Divi-

sion, saw fit, or deemed it necessary, to write an opinion in affirming the Supreme Court but affirmed without opinion. *The North Carolina Court also recognized and applied a most practical consideration utilized by the New York Courts in their considerations as to whether a contract is violative of Section 51, which is whether the divorce action has already been instituted when the contract attack was executed* (Opinion, R. p. 131). If so, such a circumstance is a controlling factor though admittedly not conclusive. In the subject case, the Respondent instituted the divorce action on February 10, 1947 (Judgment, R. p. 15), and the Second Agreement was executed April 2, 1947, almost two months later (Agreement, R. p. 47). *It is difficult to see how a contract executed almost two months after the institution of a divorce action would, or could, constitute a contract to dissolve the same marriage relationship.* This fallacious inconsistency is specifically pleaded in paragraph 3 of the Reply of the Petitioner to the Answer of the Respondent (Reply, R. p. 87).

The case of *Butler* v. *Marcuc, supra,* followed by the North Carolina Court, has been consistently approved and followed by the courts of New York and other jurisdictions interpreting the New York Law in the following cases:

In Re Rhinelander's Estate, 290 N. Y. 31, 47 N. E. (2nd) 681, 684, decided March 4, 1943;

Commissioner of Internal Revenue v. *Hyde* (N. Y.), 82 F. (2nd) 174, 176, decided March 2, 1936;

Kaufman v. *Kaufman,* 62 N. Y. S. 2nd 472, 474, decided May 10, 1946;

Abeles v. *Abeles,* 96 N. Y. S. 2nd 423, 425, decided March 29, 1950;

Tanburn v. *Tanburn,* 114 N. Y. S. 2d 670, 672, decided July 1, 1952;

Duell v. *Duell* (D.C.), 114 F. Supp. 444, decided November 20, 1951;

Eckstrom v. *Eckstrom* (Mass.), 97 N. E. 2d 416, 418, decided March 6, 1951.

See also, *Graham* v. *Hunter*, 42 N. Y. S. 2d 717; *Hoyt* v. *Hoyt*, 38 N. Y. S. 2d 312; *Graham* v. *Hunter*, 42 N. Y. S. 2d 717; *West* v. *Burke*, 151 N. Y. S. 329, affirmed 219 N. Y. 7, 113 N. E. 561; *Schmelzel* v. *Schmelzel*, 287 N. Y. 81, 38 N. E. (2d) 114, appeal dismissed, 287 N. Y. 633, 39 N. E. (2d) 269, rehearing denied, 287 N. Y. 572, 40 N. E. (2d) 38; *Holahan* v. *Holahan*, 79 N. Y. S. 2d 786; *Wersinger* v. *Cook*, 66 N. Y. S. 2d 238.

It is difficult to understand the grounds upon which the Petitioner seeks to have this Court review the decision of the Supreme Court of North Carolina other than that he was an unsuccessful litigant. The North Carolina Court followed the decision law of the State of New York and no constitutional rights of the Petitioner have been invaded. Even if there should be some conflict in the decision law of the State of New York, it is not the duty of the North Carolina Court to reconcile them but only to apply what such court considers the proper construction of the law to be if that question arises. Also, even if the conclusions reached by the North Carolina Court as to the construction of Section 51 from the decision law of New York had been erroneous, which most certainly was not the case, such would not constitute grounds for review for the mere construction of a statute of another state without questioning its validity, does not give rise to a Federal question.

Allen v. *Alleghany Co.*, 196 U. S. 458, 49 L. ed. 551, 556;

Smithsonian Institute v. *St. John*, 214 U. S. 19, 53 L. ed. 892, 897;

Johnson v. *New York Life Ins. Co.*, 187 U. S. 491, 47 L. ed. 273, 275;

Glenn v. *Garth,* 147 U. S. 360, 37 L. ed. 203, 206;
Banholzer v. *New York Life Ins. Co.,* 178 U. S. 402, 44 L. ed. 1124, 1127.

The Respondent respectfully submits to the Court that the language in *Glenn* v. *Garth, supra,* is most applicable to this action, which on page 206 reads as follows:

> "*If we were to assume jurisdiction of this case, it is evident that the question submitted would be, not whether the decision of the New York Court was against a right specially set up and claimed under the Constitution of the United States, or necessarily arising, but whether in that decision error intervened in the construction of the statute of Virginia.* If every time the courts of a state put a construction upon the statutes of another state, this court may be required to determine whether the construction was or was not correct, upon the ground that if it were concluded that the construction was incorrect, it would follow that the state had refused to give full faith and credit to the statutes involved, our jurisdiction would be enlarged in a manner never heretofore believed to have been contemplated."

And further on in the opinion on page 206 the Court stated:

> "This record may be searched in vain for any proof that, as a matter of fact, the public acts of Virginia had, by law or usage in Virginia, any other effect than was given them in New York; *nor can the contention of counsel, that the Virginia statutes should be construed according to their views, be treated as the equivalent of the express assertion of a right arising under the Constitution or laws of the United States.*"

The Respondent further submits to the Court that the cases of *Bradford Electric Co.* v. *Clapper,* 286 U. S. 145, and

John Hancock Insurance Co. v. *Yates,* 289 U. S. 178, relied upon by the Petitioner are not applicable to this case for both are clearly distinguishable. The processes of the courts in these two cases are clearly at variance with the procedure of the North Carolina Court in the subject case and Petitioner misconstrues their applicability.

Also, it is a well-settled rule that where the judgment of a state court might have been either on a state ground or a Federal ground and the state ground is sufficient to sustain the judgment, this Court will not undertake to review it.

Williams v. *Kaiser,* 323 U. S. 471, 89 L. ed. 398, 403;
Walter A. Wood Mowing & Reaping Mach. Co. v. *Skinner,* 139 U. S. 293, 35 L. ed. 193;
Allen v. *Arguimbau,* 198 U. S. 149, 49 L. ed. 990, 993;
Lynch v. *New York,* 293 U. S. 52, 79 L. ed. 191 193.

Of course, the independent state ground must be a substantial or sufficient one, but this Court has repeatedly held that a decision of a state court based on estoppel as a sufficient ground and does not present a Federal question.

Leonard v. *Vicksburg,* S. & P. R. Co., 198 U. S. 416, 49 L. ed. 1108, 1111;
Adams County v. *Burlington & Missouri River R. R. Co.,* 112 U. S. 123, 28 L. ed. 678, 680;
Israel v. *Arthur,* 152 U. S. 355, 38 L. ed. 474, 478;
Sherman v. *Grinvell,* 144 U. S. 198, 36 L. ed. 403, 404;
Beal v. *Cone,* 188 U. S. 184, 47 L. ed. 435, 438.

Therefore, assuming for purposes of argument only, that the decision in the subject case rested on the grounds of estoppel only and not also upon a construction of the New York Statute, no Federal question would even then arise in this case for review by this Court.

The Petitioner in his brief has discussed at great length the correctness or incorrectness of the doctrine of estoppel

as applied by the North Carolina Supreme Court. Such is not within the scope of this proceedings at this time. The only question involved is whether a Federal question arose which would justify this Court in assuming jurisdiction of this case. The correctness or incorrectness of the North Carolina decision is not at issue. Nevertheless, the doctrine of stare decisis does not present an impenetrable iron barrier to the North Carolina Supreme Court.

In view of the fact that the order of the Supreme Court of New York striking the provision which incorporated the Second Agreement into the divorce decree provided that such action *was without prejudice to the rights of the Respondent under said agreement* (Order, R. p. 21), the contention of the Petitioner that the Supreme Court of North Carolina failed to give full faith and credit to such decree, is so lacking in merit that no argument is necessary. In any event, the authorities hereinbefore cited would be equally applicable. If the proviso of the New York Court is contrary to the New York Decision Law, as contended by Petitioner, his remedy was an appeal to a higher Court of the State of New York.

The Decision of the State Court Is Not a Final Judgment

An essential jurisdictional requirement for review of a state decision by this Court is that the decision must be a final one and end the litigation by fully determining the rights of the parties, so that nothing remains to be done by the trial court except the ministerial act of entering judgment.

Gospel Army versus City of Los Angeles, 331 U. S. 543, 91 L. ed. 1662, 1665;

Department of Banking versus Pink, 317 U. S. 264, 267, 87 L. ed. 254, 257.

The North Carolina Supreme Court in its decision ruled that the motion to strike from the Petitioner's reply all the allegations which attack the validity of the Second Agreement should have been granted (Opinion, R. p. 134), but further stated that the parties are entitled to have the lower court consider the instruments involved as they are written and to adjudicate their respective rights thereunder. (Opinion—R. p. 134). What such adjudication will be remains to be seen. The petitioner, with full knowledge of all the facts, saw fit to base his action in his complaint upon the fact that because of the remarriage of the Respondent and the subsequent action of the Supreme Court of New York in striking from the original divorce decree the provision incorporating the Second Agreement, that the Petitioner was entitled to the relief prayed for. Petitioner has now been relegated to his original declaration.

When the record is examined relative to the matters complained of, and the opinion of the Supreme Court of North Carolina is considered in the light of the above authorities, it is respectfully submitted that no rights guaranteed by the Constitution of hte United States were violated and, therefore, this petition for a writ of certiorari should be denied.

Respectfully submitted,

WELCH JORDAN,
Attorney for Respondent.

DAVID H. ARMSTRONG,
Of Counsel.